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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

REPLY BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	Page
ARGUMENT	1

TABLE OF AUTHORITIES

CASES

Kirkpatrick v. Preisler, 394 U.S. 526 (1969)	4
Reynolds v. Sims, 377 U.S. 533 (1964)	2
Upham v. Seamon, 456 U.S. ——, 102 S. Ct. 1518 (1982)	2
White v. Weiser, 412 U.S. 783 (1973)	2, 4

OTHER AUTHORITIES

Fed. R. Civ. P. 56(e)	5
New Jersey Constitution, Art. IV	5
70 New Jersey Legislative Index No. 3	5
Passel, Siegel, & Robinson, Coverage of the National Population in the 1980 Census by Age, Sex, and Race (1982)	4

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REPLY BRIEF FOR APPELLANTS

I.

The central question in this case is whether, as this Court has repeatedly stated, state legislatures have a substantial part to play in the congressional redistricting process, or whether, as appellees would have it, the legislature's role is merely to enact whatever plan before it has the smallest census population deviation.

Appellees argue that

> "[t]he *very existence* of more equipopulous plans, together with the Legislature's failure to enact one of them, *conclusively negates* the proposition that the Legislature made a good-faith effort to achieve precise population equality . . . ."

Appellees' Br., 8 (emphasis supplied). But if the "very existence" of unadopted plans with smaller population deviations "conclusively negates" legislative good faith in congressional redistricting, then nearly twenty years' law has been jettisoned. From *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), through *Upham v. Seamon*, 456 U.S. ——, ——, 102 S. Ct. 1518, 1521 (1982), this Court has consistently reiterated the primacy of legislative policy in the reapportionment process. Appellees would excise that law from the books, and relegate the legislatures of the fifty states to a purely mechanical role in congressional redistricting.

Appellees reach this odd result despite their apparent agreement that under *White v. Weiser*, 412 U.S. 783 (1973) a court must defer to legislative policies in ordering a remedial plan. Appellees' Br., 18-21. They argue that "[n]o deference to state redistricting policy is required . . . in simply determining whether a legislatively-enacted congressional redistricting plan violates Article I, § 2." *Id.*, at 19. Appellees thus would oblige a court reviewing a redistricting plan to perform the following functions:

> Initially, the court would determine whether there existed any available plan with a smaller census population deviation than the one enacted. If so, it would find bad faith and declare the legislature's plan unconstitutional. See Appellees' Br., 8.
>
> Next, and only then, in deciding what kind of plan to adopt as a remedy, the court would defer to legislative policy and adopt a redistricting plan as close as possible to the legislature's original, even though alternatives (less like the legislature's plan) might exist with smaller census population deviations. See Appellees' Br., 18-21; *White v. Weiser*, 412 U.S. 783 (1973).

The absurdity of appellees' proposed regime may be illustrated by an example. Consider a legislature pre-

sented with three redistricting plans: Plan A, with a deviation of 0.7%; Plan B, a variation on Plan A, with a deviation of 0.6%; and Plan C, radically different from the other two, but with a deviation of 0.5%. Under appellees' proposal,

> *If the legislature enacts Plan A*, the reviewing court would be compelled to find the plan unconstitutional because of the existence of other plans with smaller deviations. However, in devising a remedy, under *White v. Weiser* the reviewing court would give weight to the legislative judgment and adopt Plan B rather than the radically different Plan C.
>
> *If the legislature had itself enacted Plan B*, however, the court would have struck it down because the "very existence" of Plan C rendered it unconstitutional.

Thus if, as appellees argue, the standard for judicial review of legislative plans requires less deference to legislative choices than the standard for judicial formulation of a remedy, a court might be placed in the incongruous position of implementing, as a remedy, a plan it would have held unconstitutional if enacted in the first place by the legislature.

There is, of course, no reason of policy that would justify making district courts engage in this kind of farce. Appellees suggest none, and none exists. Either the legislature's policies are worth deference or they are not. If they are worth deference, they are worth deference in determining the constitutionality of the legislature's plan as well as in determining the proper remedy for an unconstitutional one.

Appellees also seek simply to ignore problems with the census data. They assert that the statistical imprecision of the census results solely from the undercounting of illegal aliens, and they view the record as deficient on the

question.[1] But the statistical imprecision of census data results from a variety of factors, only one among which is the undercounting of illegal aliens. See Appellants' Br., 16-18; App. 98-104.[2] Moreover, undercount is not synonymous with the statistical imprecision of the census.[3] Thus, appellees' discussion of what the law should be if the only errors in census data resulted from undercounting illegal aliens is simply beside the point. The central point is that one cannot meaningfully require more precision from redistricting plans than the underlying census data used to formulate those plans will permit.[4]

Moreover, the record sufficiently presents the questions this Court took this case to resolve. Dr. Trussell's statement (App. 97-104) was unchallenged below. Indeed, in the District Court appellees' counsel agreed to submit the

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[1] Appellees appear now to have abandoned the contention, made in their Motion to Affirm, at 13-14, that the Constitution compels reliance on the census data in congressional redistricting.

[2] For example, preliminary estimates suggest that the undercount for black men aged 35 to 54 is about 15%. J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population in the 1980 Census by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis* (1982) (Current Population Reports, Special Studies P-23, No. 115).

[3] Consider a man looking at his bank statement. If the bank says that only half of his deposits have been credited, he has been undercounted. If the bank tells him that somewhere between 95% and 105% of his deposits have been credited—but doesn't tell him precisely how much—his problem is imprecision.

[4] This is not, as appellees suggest, a "resurrection of the *de minimis* theory" rejected before by this Court. Appellees' Br., 8. We do not contend that there is any statistically significant minimal deviation, such as the 5.97% in *Kirkpatrick*, or the 4.13% in *White*, which is permissible. However, the statistical imprecision of the data is an inherent limiting factor on the uses to which the data can meaningfully be put. Where, as here, an infinitesimal deviation is within the statistical imprecision of the data, it is not a *de minimis* deviation, but the functional equivalent of no deviation at all.

case for decision without the presentation of live witnesses "as long as all the submissions, all the depositions, all of the affidavits are received in evidence." Transcript of Proceedings, February 26, 1982, at 56-57. *See* Fed. R. Civ. P. 56(e). Appellees were content with the breadth of the record in the court below. They have no basis for complaint now.

II.

Appellees insist that the New Jersey legislature's concern for minority voting strength was only "pretextual," and its concern for population equality merely "aspirational." Appellees' Br., 11, 22.[5] In fact, protection of minority voting strength was a concern of the leadership throughout consideration of the various plans,[6] and support of legislators from districts with substantial minority populations was essential to its ultimate passage.[7] The District Court, however, declined to consider whether the legislature's desire to preserve minority voting strength justified the deviations primarily because the court felt that the legislature had to show, but had not shown, a direct connection between the population variances in the Fourth and Sixth districts and the minority concentra-

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[5] This question, of course, is relevant only if the Court rejects our main argument that deviations less than the statistical imprecision of the census data are the functional equivalent of zero.

[6] *See, e.g.*, Jackman Deposition at 12, 14, 91; Karcher Deposition at 125, 136.

[7] P.L. 1982, c.1, passed the Senate 21-18 and the Assembly 42-34. 70 New Jersey Legislative Index No. 3, at S17 (January 31, 1983). In the Senate, the minimum number of votes required for passage is 21; in the Assembly, 41. *New Jersey Const.* Art. IV, § 2, par. 1, 3; Art. IV, § 4, par. 6. Thus the bill passed the Senate with the absolute minimum required, and the Assembly with only a single vote to spare. Obtaining the support of minority political leaders, *see, e.g.*, Gibson Statement, App. 86-90, was both good politics and good government.

tion in the Tenth.[8] We have argued at length in our main brief, pp. 35-37, why we believe the District Court erred, and will not repeat that argument here.

Two points do require brief rejoinder, however. Appellees claim that appellants' counsel conceded below that he could not say with certainty that the district lines were drawn in order to avoid dilution of minority voting strength. Appellees' Br., 12 n.5. This is a misreading of the record: counsel was not answering the question appellees say he was.[9] Second, appellees argue that S. Howard Woodson's affidavit is "self-contradictory" because of

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[8] In addition, the District Court relied on the fact that Orange (a city with a high concentration of minority groups) was not added to the Tenth District. Opinion, J.S. 9a-10a. But, as we have pointed out before, there is no basis for drawing a negative inference from this fact. Orange had been in the Eleventh District in the 1970 redistricting; and there is no evidence to show whether it could have been moved into the Tenth District without removing an equal number of minority voters, or how the missing voters could have been made up in the Eleventh District.

[9] Appellees state that

> "When asked by the District Court at oral argument *whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority strength,* counsel for appellants was forced to concede that he 'could not say that happened with certainty . . . .'"

Appellees Br., 12 n.5 (emphasis supplied). The answer is right, but the question is wrong. The transcript reads as follows:

> JUDGE GIBBONS: And the 4th, how does that bear on the underage in the 10th?
>
> MR. WALSH: All right.
>
> If one is putting together a map which reflects community interests and the 10th is one such jigsaw, and here is the 10th (indicating), the 10th itself is surrounded by a salient from the 7th, and thereafter is abutted by the 6th; as population and towns with communities of interest have moved in one district, as the Baer plan suggests and as the consensus developed around the law which was actually passed, other district lines move as well which may change their deviation. I can't say that happened with certainty. There were many con-

his views about the best road to minority political power in New Jersey. Appellees' Br., 12-13 n.5. Mr. Woodson believes that minority groups should seek amalgamation of minority votes in those cases where the effect is majority control in one district, such as New Jersey's 10th, but division where majority control is impossible and division would yield substantial influence in *two* districts. See his Affidavit, App. 93-96. It remains a reasonable position, whether or not it is shared by appellees' counsel. Minority political leaders are entitled to act upon their own view of what is in their constituents' best interests.

III.

Amicus the Republican National Committee takes a different tack. Amicus recognizes that the deviations in P.L. 1982, c.1, are not "inherently unconstitutional," *Amicus* Br., 6, and instead argues that the New Jersey plan is invalid because "a dominant motive" of the legislature was "a desire to dilute Republican voting strength." *Amicus* Br., 7.[10] The District Court made no such find-

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versations and judgments which went into the passage of the present law.

App. 181. In other words, the question which counsel could not answer with certainty was *not* "whether he had any evidence to demonstrate that the districts were drawn in order to avoid the dilution of minority voting strength," but whether he could show a relationship between the composition of the Fourth and Tenth Districts.

[10] *Amicus* also, somehow, finds "bad faith" in the statement of Speaker Alan Karcher that he would not even consider any plan with a deviation greater than 1%. *Amicus* Br., 8. But Speaker Karcher did not lose sight of the goal of absolute district equality for plans below the 1% mark; he simply refused even to consider plans with a greater deviation. As he testified on deposition:

Q What did you mean by Principle A, equality of population in the various districts?

A What do I understand that to mean?

[Footnote continued on page 8]

ing; no such charge was made below; and consequently, none of the parties in the District Court even attempted to construct a record upon which such a claim could be judged.[11] In any event the claim is belied by the 1982 elections, which demonstrated that—as usual—the race goes to the incumbent. New Jersey has fourteen congressional districts. Incumbents ran in all fourteen districts, and won in thirteen.[12] In fact, the composition of New Jersey's House delegation virtually parallels the composition of the House as a whole.[13] Notwithstanding the contrary view of the Republican National Committee, the 1982 New Jersey election returns show no "dilution" of Republican voting strength—just the choices of voters in a typically good year for incumbents.

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[10] [Continued]

Q Yes.

A I understand that to mean that there is the population divided by the number of districts within the State; that that figure, that mathematical certainty of what the ideal district is established thereby; that for purposes of reality, that that model district, if you will, is aspirational, and that was the word that was used; that we have to anticipate that that figure of model district will be—has to be taken within the context of reality as aspirational, *but that we should never lose sight of the fact that is what you should strive for and that is really the hallmark of the process.*

Karcher Deposition, 23-24 (emphasis supplied).

[11] Plaintiffs below did introduce the "Jackman Letter," App. 35. But uncontradicted deposition testimony shows that the letter, while written at Mr. Jackman's direction, was not written by him and not even signed by him. Jackman Deposition 39-40, 135-137.

[12] The sole unsuccessful incumbent was Harold Hollenbeck, a Republican running in the Ninth District. The remaining incumbent, Millicent Fenwick, sought election to the Senate.

[13] The House as a whole contains 268 Democrats and 165 Republicans, and thus is 62% Democratic. The New Jersey congressional delegation contains 9 Democrats and 5 Republicans, and thus is 64% Democratic.

Respectfully submitted,

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